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## TENDENCIES OF LEGISLATIVE POLICY AND MODERN SOCIAL LEGISLATION.<sup>1</sup>

ERNST FREUND.

THE last ten years have witnessed remarkable changes in the attitude of American courts toward social legislation. In 1905 the negation of legislative power seemed to have reached its extreme limit in the decision of the Supreme Court in the so-called bakeshop case (*Lochner v. New York*, 198 U. S. 45). In 1908 the favorable attitude of the same court toward the limitation of women's hours of labor gave hope for greater liberality (*Muller v. Oregon*, 208 U. S. 412), and this was strengthened in 1910 by the apparent change of position of the Supreme Court of Illinois on the same question of women's hours of labor (*Ritchie v. Wayman*, 244 Ill. 509). There followed however a year afterward, in 1911, the annulment of the workmen's compensation act of New York by the Court of Appeals of that state (*Ives v. South Buffalo R. Co.*, 201 N. Y. 271). While this extraordinary ruling did not, as subsequent developments have shown, stop the onward course of the type of legislation which it checked only slightly, yet as the unanimous expression of the most important of state courts it could not be regarded as otherwise than extremely signifi-

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<sup>1</sup> This article forms the introduction and first chapter of a forthcoming volume, "Standards of American Legislation."  
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cant. It seemed quite inadequate to apply to such a decision the usual methods of legal criticism; for even if it were possible to demonstrate conclusively the unsoundness of the conclusion reached by the court, the question would remain how it was possible that so narrow a view of legislative power could command such eminent support, and what theory of judicial control or of constitutional limitation it indicated.

A clue to the situation may be discovered in the opinion itself. The court speaks of the cogent economic and sociological arguments urged in support of the workmen's compensation law; it admits the strength of the appeal to a recognized and widely prevalent sentiment; but, the opinion adds "it is an appeal which must be made to the people and not to the courts." Here, in other words, is a law that can be made by the people, but not by the legislatures. It is well known that the appeal was successfully made, and a new compensation law enacted under express constitutional authority which the Court of Appeals has since sustained (*Jensen v. So. Pac. R. Co.*, 215 N. Y. 514).

To the Court of Appeals, then, the due process clause of the constitution, upon which it based its decision, was not, as the similar clause in the federal constitution appeared at least in one case to the Supreme Court, a clause intended to secure the immutable cardinal principles of justice (169 U. S. 387). It is unthinkable that the court should have suggested an appeal to the people to subvert those principles. It was rather a fundamental policy of distributive justice which the New York Court saw fixed upon the state by the guaranty of due process,—fundamental, but after all only a policy, liable to be changed by the progress of economic and social thought.

It is an interesting and significant fact that the attitude of the courts toward social legislation which culminated in the *Ives* case gave rise to the demand for a right to recall judicial decisions which was inscribed upon the platform of a political party. The demand represented, in addition to the dissatisfaction with the judicial resistance to policies

endorsed by progressive and insistent popular sentiment, a strong political reaction against the claim of judicial power to fix upon the state by way of constitutional interpretation, policies which were merely implied and upon which the people had never had a chance to declare themselves explicitly. If the movement for the recall of judicial decisions is severely condemned—and there is no intention here to defend it—it should at least be understood how it arose, and it should help us to discriminate between policies and principles.

The popular objection to the attitude of the courts in opposing to social legislation alleged constitutional policies was however not merely that these policies were implied and therefore judge-made; more serious was the fact that they were entirely indefinite. It would be possible to read into our constitutions, as essential to republican government, a right of political association in analogy to the explicitly guaranteed right of assembly. Such a right could be easily formulated and its limits judicially defined without great difficulty. It is otherwise with the rights that are supposed to stand in the way of advanced social legislation. We have heard much of freedom of contract: would any one be prepared to place this right by the side of freedom of press and religion, without definition or qualification? Legislative regulation of the right of contract can obviously be questioned only by reason of the manner and extent, not by reason of the mere fact, of its exercise. But then, from a legal standpoint, the essential thing is not the right, but its qualification, and an undefined claim to freedom of contract presents in reality no justiciable issue.

What then have the courts done to define the issue? Have they said that the freedom of contract may be impaired only for the protection of public health and safety? No, for they always also make a reservation for the vague interest designated as public welfare. Do they concede to the state the right to interfere on behalf of economically inferior classes? There is as yet no clear doctrine to that effect. After all the courts offer us nothing more definite

than the idea of reasonableness, a criterion which lacks both precision and objectiveness. What should we say to a similar criterion in the law of property? A family settlement has been said to be much like an act of parliament, and, not unlike public legislation, it impairs the freedom of property. The courts have therefore established a rule against perpetuities. In an early leading case,<sup>2</sup> Lord Chancellor Nottingham, who had sustained a settlement which made property inalienable for a number of lives in being, was asked to indicate the bounds of a lawful limitation: what time? where are the bounds of that contingency? where will you stop if you do not stop here? "I will tell you," he said, "where I will stop: I will stop wherever any visible inconvenience doth appear." It took the courts one hundred and fifty years to define this visible inconvenience with precision; before that time they operated with the principle of reasonableness, thereafter they discarded it, and placed the law upon a certain footing. The criterion of reasonableness may be the only one available; but if so, it means that adequate scientific or conventional tests have not yet been developed. To oppose legislative discretion by undefined judicial standards of reasonableness is to oppose legislative by judicial discretion, and constitutional doctrines so vaguely formulated cannot be expected to command confidence.

Apart from this, the question will remain whether the extent of legislative power over personal and property rights not covered by specific constitutional guaranties is a legal or a political issue. The prevailing doctrine of constitutional law treats the issue as a legal one and thus assigns its determination to judicial authority; but if it is in its nature political, the purely judicial attitude of mind brought to the task must constitute a limitation and a handicap rather than a superior qualification. It is therefore worth while to examine the relation of law to individual rights from a broader point of view than precedent

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<sup>2</sup> Duke of Norfolk's case, 3 Chancery Cases 1, 1682.

and implication from abstract formulas, and to see whether a survey of historic changes will not give a fairer basis for estimating the legitimacy of statutory policies. The result of the examination should enable us to estimate the factors by the aid of which a system of constructive principles of legislation may be built up.

The main phases of evolution which are summarized in the catalogue of changes which follows are perfectly familiar; they are restated simply in order to bring out pointedly the drift of modern legislative thought and its significance.

They arrange themselves naturally under a few principal heads: the recognition of the right of personality; the establishment of freedom of thought; the repression of unthrift and dissipation; the protection of public health and safety; and the relief from social injustice.

### 1. *The right of personality.*

It is a commonplace of legal history that the importance of status as something differentiated from personality diminishes as we proceed from primitive to modern law. We have almost attained to a wiping out of personal differences in relation to legal rights; but the leveling process is in many respects quite recent, and, so far as it goes, has in the main been fully accomplished only in the course of the nineteenth century.

Let us briefly review the principal phases in the establishment of free and equal personal status.

(a) The abrogation of personal slavery and serfdom.

These have practically disappeared from the face of the civilized earth. By the beginning of the nineteenth century all personal unfreedom had ceased to exist in western Europe, and Russian serfdom was abolished from 1861 to 1864. About contemporaneous was the fall of negro slavery in the United States, which was made legally perfect by the Thirteenth Amendment, proclaimed in December, 1865; the emancipation of negro slaves held by whites had begun in 1833 in the British colonies, and was completed by the

act of Brazil in 1888. European powers still tolerate customary forms of domestic slavery within their spheres of influence in Africa; but even here the slave trade is suppressed by the Brussels convention of 1890.

(b) The disappearance of legal class distinctions.

If we ignore the anomalous and rapidly waning status of our own tribal Indians as wards of the nation, Russia alone of the Western nations continues to divide her people into classes having different legal capacity (nobility, clergy, citizens, peasants, besides Asiatics and Jews). France did away with class disabilities as a result of the great Revolution in 1789, while in Germany the last traces of peasants' disabilities did not disappear until 1867. Blackstone gives in his Commentaries a list of classes of the community which (barring the political privileges of the peerage) impresses us as formal and practically insignificant; it has indeed been one of the chief merits of the common law that for many centuries past it has been singularly free of class distinctions. This rule of equality was inherited by the American law. Because the principle of equality had never been a great issue in the constitutional history of the English people, it received only a perfunctory recognition in the early bills of rights; its deliberate and distinct formulation by the Fourteenth Amendment was due to the race conflict of the South and came only after the Civil War. The practical acceptance of the principle thus long preceded its formal declaration. The principle encounters difficulty only in its application to the colored race; and in the legal enforcement of reciprocal discrimination and segregation in marriage, in education, and in transportation in public conveyances (quite recently also in residence) denies the principle in substance, while claiming to respect it.<sup>3</sup> The demand for legal penalties shows that the social sanction is not believed to be sufficiently strong to maintain a separation strongly supported by the sentiment of the dominant class.

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<sup>3</sup> Freund, *Police Power*, Sec. 691-700.

Apart from this anomaly, however, in the modern world the accident of birth as a member of a social class neither carries privilege nor entails disability in the capacity to acquire or hold legal rights.

(c) The recognition of the legal rights of aliens.

In the ancient Roman law alien and enemy were alike, covered by the same term—*hostis*—and entirely without legal rights. To-day by comity or treaty the alien enjoys practically the same civil capacity as the citizen. The common law attaches to alienage certain disabilities in the matter of land tenure which have not been everywhere or altogether removed by legislation and which in some instances have been added to, particularly with reference to non-resident aliens. By an anomaly of our constitutional law this matter is in America still under state control, subject to the supremacy of treaty stipulations. It is noteworthy that the guaranties of the Fourteenth Amendment apply to all persons within the jurisdiction of the states, and not merely to citizens.

The important right of immigration and settlement is not necessarily included in the civil capacity of the alien. In many countries the matter is not of sufficient importance to have called for special regulation, but where immigration assumes considerable dimensions, the right has been qualified by restrictive legislation. Our own legislation is typical in that respect. In the absolute exclusion of Chinese laborers disabilities of race, class, and alienage are combined, and this legislation serves as a warning that the modern principle of equality is by no means of absolute operation.

(d) The emancipation from domestic subjection.

The law of ancient Rome and the law of modern Japan are typical of legal systems in which members of the household are subjected to the dominion of the male head and individually of imperfect legal capacity. In Rome the wife became in course of time relieved from this subjection, and in the case of the child it survived mainly as a formal rule of law, practically nullified by important modifica-

tions and exceptions. The continental nations which received the Roman law repudiated this entire branch, and related institutions of their own (*mundium*) gradually died off. In the modern civil law the wife is an inferior partner, but still a partner, in the marital community.

The common law of England practically reproduced for the wife the dependent status which the older Roman law assigned to all the members of the family except the head. It even aggravated the dependency by denying to the wife the capacity to perform disposing or binding acts (*coverture*; *feme covert*). It is significant that the old law of serfdom furnished to English lawyers analogies for the relation of husband and wife. The courts of equity managed, however, to give to the married woman a very considerable protection in the enjoyment of her property.

The law of *coverture* was taken over by the American states, together with such practical modifications as the system of equity jurisprudence had developed in England.

Legislative reform began about 1840, and in the beginning did little more than adopt and enact into statute law the doctrine of the courts of equity. Gradually it made the wife entirely independent of the husband. In this legislation England followed America, beginning her reform in 1870. In America the course of legislation extended over a very long period; Tennessee, as the last state, did not abandon the system of *coverture* until 1913. In those states which have on the whole adopted the continental system of marital community of property rights, the peculiar disabilities of *coverture* are likewise unknown.

It should be remembered that the *coverture* applied only to women living in marriage; that in other words, the common law recognized no sex disability in the matter of civil rights.

In considering domestic subjection, it is also necessary to refer to the status of the child, that is, the infant child, for parent and adult child are in law, except for purposes of inheritance, practically altogether strangers to each other.

As a holder of property, the infant child occupies a position of peculiar independence in the common law, for the father has neither usufruct nor guardianship (except the "socage" guardianship with regard to land which terminates when the infant attains fourteen<sup>4</sup>); on the other hand, the father is entitled to the earnings of the child, and to this absolute right to the earnings corresponds no similarly absolute duty to support, for from this the father may relieve himself by emancipating the child and thereby surrendering the rights to earnings.

The personal control of the father over the minor child is at common law almost unlimited; even an effectual criminal liability probably did not exist except in case of homicide, the policy of the law being very decidedly not to interfere with the exercise of domestic authority. There was thus a domestic subjection of the severest and most unqualified kind. This has been broken in upon only by very modern legislation, beginning with the criminal punishment of cruelty, and more recently establishing a system of public care of juvenile dependents. The development of this phase of law, which may be said to have started with the Illinois law of 1899, is in its very beginning and the rights of the parent will undoubtedly more and more assume the character of a trust.

This completes the series of legal changes through which personal status has gone. Liberty and equality have received practically universal recognition, but this has come only in the nineteenth century. Race alone remains a sinister distinction which the law has not fully overcome, and which in some respects it even tends to emphasize, owing to the greater menace of foreign race invasion in modern times. The disability of the child, a transitory status, must of course remain, but the emancipation from the abuse of domestic power constitutes perhaps the most marked triumph of the right of human personality.

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<sup>4</sup> The father was formerly regarded as the guardian of the child's personal property; see Blackstone I, 461, and the act of 1670 which gave him the right to appoint a guardian for the child by deed or will.

2. *Freedom of thought.*

All American bills of rights give prominent places to religious liberty and the freedom of the press. The guaranties incorporate both the achievements and aims of constitutional struggles, and philosophical theories of natural right. They represent political ideas directly contrary to the maxims of earlier state craft. Until far into the seventeenth century it had been a commonplace of public policy that the safety of the state demands the control of opinion. The view that religious dissent was a factor of political disintegration found expression in the English Conformity acts (reign of Elizabeth), in the maxim accepted in the peace of Westphalia (1648); "*cuius regio, eius religio*," and in the revocation of the French Edict of Nantes (1685). Though the American colonists had sought refuge from religious oppression, Rhode Island alone of all colonies proclaimed the principle of toleration. To the present day Russia regards heterodoxy as inimical to her national unity. With these historic facts in view we can better appreciate the step in advance which religious liberty represents, and yet in the course of the nineteenth century toleration, if not religious equality, has been established all over the civilized world, and belief and worship are nowhere any longer the subjects of penal repression.

As regards the press, Blackstone tells us that the art of printing, soon after its introduction was looked upon in England as well as in other countries as "merely a matter of state."<sup>5</sup> Its control was part of the freely conceded jurisdiction of the Star Chamber. After the fall of the latter, its control simply passed to Parliament, which exercised it on similar principles. The essence of this control was that nothing was to be printed without previous license, and by the removal of this requirement in 1694 the liberty of the press was supposed to be established. In the course of the eighteenth century, however, a further struggle took place for greater freedom from responsibility,

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<sup>5</sup> Commentaries IV, 152 note.

which resulted in the liberalization of the law of libel. Our bills of rights reflect this stage of development: they guarantee impunity for true matter published, but only if published with good motives. Here most of our constitutional guaranties stop: but the practice of the nineteenth century has proceeded far beyond this, and now, generally speaking, not only is truth an absolute justification, but the defence of privilege is recognized to the widest extent in every kind and form of public criticism.<sup>6</sup> The free expression of opinion on political subjects is guarded with possibly even greater jealousy than the freedom of art, literature and science, and of social thought and agitation.

In view of the wide toleration of freedom of political agitation which public opinion demands, the law of sedition even where not formally abrogated has lost much of its practical importance; when, in 1886, in England in consequence of strong public labor demonstrations, prosecutions were instituted against prominent leaders, the instructions as to the constituent elements of sedition were so qualified that the jury could do hardly otherwise than render a verdict of not guilty. (Reg. v. Burns, 16 Cox 355; Reg. v. Cunningham, 16 Cox 420; Russell on Crimes I, 557-565.) The law is equally obscure in America, where, as in England, the conditions under which government has been carried on for the last hundred years have rendered political repression unnecessary or inexpedient.

We have here a complete reversal of the public policies of former times, which yet had a show of plausibility in their favor; the experience of a great war shows how effectually after all, for a time at least, public opinion can be controlled by authority, and how much the action of the state in a certain direction can be strengthened thereby. That immediate political advantage is so readily sacrificed to the conviction that free expression of opinion is in the long run more wholesome to the constitution of the body politic, is one of the most remarkable achievements of

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<sup>6</sup> See Schofield, *Freedom of the Press in the U. S.*; Publications Amer. Sociol. Society, Vol. 9, p. 67.

democracy and of education in public affairs. That the achievement is not altogether safe from attack and impairment is shown by the public attitude toward anarchistic agitation, as evidenced by the shortlived red flag law of Massachusetts, an attitude comparable to that of those of our state constitutions which temper their toleration of religious dissent by creating certain disabilities for atheists.

The establishment of the right of personality and of freedom of personality and of freedom of thought are accomplished in the main by the removal of legal and other restraints, and the positive function of legislation is relatively slight; the advances in the protection of human interests which follow involve, on the other hand, a constant enlargement of the field of legislative activity and control.

### 3. *The repression of unthrift and dissipation.*

Certain phases of this legislative policy are old or even antiquated; thus the formerly prevailing type of sumptuary legislation has disappeared. On the whole, however, the activity of the state against the three great forms of unthrift: gambling, drink and vice, has gained in incisiveness and extent, and its greatest development has taken place in the American democracy.

The relation of the state and the law to moral ideals is complex and peculiar. The main motive power of every political organization is self preservation which produces the type of the state best fitted for the maintenance of communal integrity. After some type has once successfully established itself and led to the predominance of one element of the body politic, the instinct for self-preservation again makes the interest of that element the ruling factor of state policy. Morality as represented in law thus becomes subordinate to and an instrument of the established order of things; and in all communities it tends to be identified with authority, the family, and property. The

canons of justice and equity presuppose respect for these institutions, and purely ethical standards of conduct lie outside of the range of civil obligations.

In European systems of polity the place of morality was further determined by the position and the claims of the church. The Christian religion was based on ethical ideals; ethical thought and ethical aspiration were in consequence entirely dominated by religion, and the state considered that the preservation of public morals was not a secular function but belonged to the church.

The common forms of moral laxity and dissipation were thus regarded as sins to be visited by spiritual penalties, and almost the entire law of sex relations, including marriage, fell in England to the province of ecclesiastical jurisdiction, and the marriage law has to the present day not been entirely secularized. It is also to be noted that non-forcible injuries were only gradually drawn within the cognizance of the King's courts; defamation (which was first an ecclesiastical offense) not until the seventeenth century, while fraud became a tort only toward the end of the eighteenth century.

It was only after the reformation and the attendant relaxation of church discipline that evil practices not directly invading others persons' rights or public authority were drawn within the range of legislative policy; the first attempts to repress gambling and prostitution date from the reign of Henry VIII, and from the reign of Edward VI on the liquor trade is subjected to the régime of the licensing system.

The attitude of the English law (and that of continental countries is similar) toward gambling, drink and vice has remained tolerably fixed for centuries; the liquor business has been the subject of constant restrictive regulation, while gambling and vice were placed beyond the pale of legal protection, but otherwise tolerated as long as outwardly disorderly practices were avoided; an attitude of indulgence toward the common human weaknesses became part of the established order of things.

It is interesting to observe how with the advance of democracy the legislative policy toward these evils becomes gradually more aggressive. The mass of the people struggling for material prosperity prize the "middle class" virtues of habits of industry and domestic regularity, and they seek to impress their ideals upon the legislation which they control. Thus liquor becomes a conspicuous issue in politics; absolute prohibition, a radical interference with personal liberty, is first introduced as a legislative policy; the same policy is applied to gambling and particularly to lotteries, previously used freely as a means of raising funds for public purposes, and in many states the prohibition is made part of the fundamental law; and for the first time a determined crusade is instituted to suppress prostitution.

The standards of this "morals" legislation are perhaps all the more advanced, as the standards of enforcement are not equally high. This may be due to our peculiar governmental organization which divorces legislative power entirely from administrative responsibility. The formal declaration of policies is insisted upon irrespective of whether they can be carried out faithfully or even with tolerable success; indeed the advanced policy is sometimes consented to only upon the tacit understanding that in actual administration it will be somewhat relaxed. The result is inevitably a certain demoralization of governmental standards, but the system makes possible an insistence upon high abstract moral ideas, which in other countries is deemed impracticable, and which all the time operates as an educative influence.<sup>7</sup> Even with its imper-

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<sup>7</sup> Note: Under the German ideal of scrupulously correct statutes strictly enforced, legislation is likewise an educating influence, but of a different type; it is not meant to represent an ideal to be ultimately attained, but a practical norm of conduct; just and fixed rules, the most powerful and insistent expression of the social conscience, are to operate as a sort of secular catechism, and the sense of formulated boundaries is relied upon to check the impulses of unsettled character;—an education that consists in the subordination of individual tendencies to general standards. This point of view is admirably developed in a recent German treatise. (F. W. Foerster, *Schuld und Suehne*, 1911.)

fect operation, however, this phase of legislative policy carries with it encroachments upon personal liberty which would not have been ventured upon by less democratic systems of government.

#### 4. *The protection of public health and safety.*

The large amount of health and safety legislation which fills modern statute books represents less a change of legislative policy than a change of conditions that had to be met by an extension of state control. In principle the exercise of public power for the protection of life and limb is old established, but prior to the nineteenth century there was relatively little occasion for its practical application. The nineteenth century brought two conditions which revolutionized the need for public control: the pressing of newly invented mechanical forces into the service of industry, and the progress of science in discovering the causes of disease and their remedies. The imperative necessity of developing economic resources retarded adequate protection against mechanical dangers until it was possible to combine safety with the effective carrying on of industry; the former had to yield to the latter; this is well illustrated by the history of the mining legislation.<sup>8</sup> Sanitary legislation encountered resistance on the part of personal and property rights as well as of business interests by reason of the widespread skepticism regarding the reality of the alleged dangers or the efficacy of the proposed remedies, but the English law of 1848 and the New York law of 1857 firmly established the principle of an elastic administrative control, and the recent American so-called eugenics legislation indicates the long distance that we have traveled in the direction of state interference with private affairs. Living under free institutions we submit to public regulation and control in ways that would appear inconceivable to the spirit of Oriental despotism; it is well known what deep-seated repugnance and resistance of the native population to the invasion of their domestic privacy and personal

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<sup>8</sup> R. G. Galloway, *History of Coal Mining in Great Britain*, 1882.  
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habits English health officers in India have to overcome in order to enforce the sanitary measures necessary to prevent the spread of infectious or contagious disease. Oriental systems of polity act more powerfully upon the habits of individual life than modern governments do; the primal need of the community for the perpetuation of its own existence through marriage and offspring is more effectually secured in India and China than in Western Europe; but the sanction is custom and not law; and in the same way the sanitary régime of the Old Testament seems to have been enforced by spiritual threats and not by secular penalties. Modern policy makes legislative compulsion co-extensive with the reciprocal dependance of men upon each other's standards of conduct for the preservation of the health and safety of all, and with the progress of invention and of science there seems to be hardly any limit to that independence. Our modern sanitary laws are laws in the real sense of the term enforced by the power of the state. As such they represent, if not a new policy, yet a new legislative activity and function.

### 5. *The growth of social legislation.*

The development of phases of legislative policy thus far traced shows two main tendencies: the steady growth in the value placed upon individual human personality, and the shifting of the idea of the public good from the security of the state and established order to the welfare of the mass of the people. The growth of social legislation combines those two tendencies. By the term social legislation we understand those measures which are intended for the relief and elevation of the less favored classes of the community; it would thus be held to include factory laws, but hardly legislation for the safety of passengers on railroads.

The lower classes (as the term was formerly commonly used) became the object of special legislation in England after the great plague; but the policy of this early legislation was repression and not relief. The first great systematic relief measure was the English Poor Law of 1601

(43 Elizabeth, c. 2); it is worth noting that the principle of taxation by state authority for the relief of the poor was not introduced into France until three hundred years later, in 1908, as a result of the separation of church and state. In the beginning of the nineteenth century, England inaugurated a new phase of social legislation by her child labor law of 1802, followed by a series of other factory laws.

Yet until about twenty years ago the term social legislation was generally unfamiliar and conveyed little meaning even to students of reform movements. The word came from Germany, and there originated about the beginning of the eighties. More particularly the new term social legislation was associated with the workmen's insurance measures announced by the message of November 17, 1881, submitted by the German Emperor to the Reichstag, which provided relief in form of pensions for sickness (1883), accident (1884) and invalidity and old age (1889).

The purpose of these measures as proclaimed by the imperial message was to counteract social democratic agitation, and to supplement the repressive law of 1878 by positive and constructive state action. Other European countries gradually enacted similar legislation; in England compensation for industrial accident was introduced in 1897, old age pensions in 1908, and insurance against sickness and unemployment in 1912. The American states have so far approached only the problem of compensation for industrial accident; since 1910 about three-fourths of the states have enacted measures of that kind.

What was the special feature of this new legislation that marked it as a new departure in legislative policy? It was that relief changed its character. Poor relief had been a matter apart from industry; it had stigmatized the recipient and placed him under disabilities; the policy of the English poor law reform of 1834 had been to make it in addition distasteful and repellent (indoor relief). The new pension or compensation system carried no stigma or disability, and by its conditions or terms rather seemed to be in the nature of the discharge of a debt that the com-

munity owed to its members, a deferred payment for previous inadequately rewarded services or a compensation for some kind of injustice suffered. It realized the idea of a "respectable provision unattended with degradation" first put forward in 1837 (Rose, *Rise of Democracy*, p. 100), and again advocated in the Minority Report on poor law reform under the name of an "honorable and universal provision." In Germany the entire legislation moreover incorporated important features of insurance. The recipient of pensions or other allowances upon an insurance basis takes them, morally as well as legally, as a matter of right, and would be beholden to the community merely for setting the plan in operation and administering it. Every contribution from the employer or from the community alters the nature of the allowance, and the tendency in England and America has been to relieve the beneficiary from any contribution, and to throw the entire burden upon either the community (old age pensions) or upon the employer (workmen's compensation). However free from stigma, the provision is thus yet in the nature of relief.

In Europe relief legislation of the advanced type is at present as firmly established as sanitary or safety legislation, the defects of which it in part supplies, while America is only just beginning to develop that part of the system which connects most closely with the remedial methods of the common law.

Even in Europe a sharp line is still drawn between relief, and the larger policy of using the power of the state to alter the economic terms of the labor contract. An entire readjustment or reconstruction of the economic relation between the classes, is not as yet, generally speaking, considered as part of a practical legislative program.

Not so very long ago this larger program would have been sufficiently condemned by being characterized as socialistic, and even at the present time there is an instinctive perception that the most liberal policy of relief is in principle still very far removed from an attempt to control economic relations under normal conditions.

We are however quite accustomed to one form of relief, which is really undistinguishable from social reconstruction, and that is the legislation dealing with children. It is well to remember that factory laws began everywhere with the regulation of child labor, and that that regulation always went hand in hand with efforts to secure to the child some measure of education and instruction. And with regard to education, the American states, at a period when they represented the most individualistic type of political and economic organization, pursued a progressively socialistic policy, shifting more and more the financial burden of education from the family to the community. While the existence of universal suffrage has given to this form of communism a political justification, the present movement for vocational instruction is significant in frankly abandoning this basis and embarking upon schemes of economic reconstruction, the consequence of which can hardly be foreseen.

As factory legislation in England began with the regulation of the employment of children, so it advanced further along the line of less resistance by restricting the hours of labor of women. When the bill which resulted in the act of 1844 was agitated, the men desired the like reduction for themselves, but were satisfied that the legislation should be confined to women in the hope, which events justified, that the legal reduction of women's work would accomplish without legislation the same purpose for men.<sup>9</sup> The act of 1844 had been preceded by a report calling attention to the special physical considerations which made the restriction desirable for female employees.<sup>10</sup> Whether exclusively on this ground or not, the state from now on extended its guardianship in the matter of industrial labor over both women and young persons. A similar development took place in Germany where a maximum work day for women in factories was established in 1892.

In the United States the regulation of women's hours of

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<sup>9</sup> Hutchins and Harrison, *History of Factory Legislation*, p. 186.

<sup>10</sup> *Ibid.*, p. 84.

labor has furnished the main battleground for conflicting theories of constitutional right and power. The course of decisions proved on the whole favorable to state control. Of the two adverse holdings, that of Illinois, rendered in 1895,<sup>11</sup> was greatly weakened if not nullified in 1910,<sup>12</sup> that of New York, relating to night work (1907), directly overruled in 1915.<sup>13</sup> There has however been considerable inclination to support this legislation on the stricter theories of the police power. A vast array of material was presented to the Supreme Court to prove the detrimental effect of prolonged industrial work upon the female organism, and not only the prohibition of night labor, but also minimum wage laws have been sought to be connected with the protection of morals. It is therefore significant that in the Oregon case (208 U. S. 412) Justice Brewer referred to female peculiarities of disposition and habits of life which remove her from equality of competition and justify special protection to secure her a real equality of rights (p. 422).

As legislation for women advances from the ten hour day to the Saturday half-holiday, to the eight hour day (established for the District of Columbia in 1915), to the total prohibition of night work, and to the regulation of wages, the narrow foundation of the old established grounds of the police power will become more and more untenable, and courts will be forced to recognize in such laws measures of social and economic advancement, and not merely measures for the protection of health or morals. It will then become necessary to scrutinize the ground of differentiation between men and women, and particularly to examine whether such differentiation implies inferiority, as the words used by Justice Brewer may seem to indicate. At a time when women are demanding equal political rights, it does seem incongruous to insist unduly upon

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<sup>11</sup> *Ritchie v. People*, 155 Ill. 98.

<sup>12</sup> *Ritchie v. Wayman*, 244 Ill. 509.

<sup>13</sup> *People v. Williams*, 189 N. Y. 131, *People v. Charles Schweinler Press*, 214 N. Y. 395.

infirmities inherent in sex, and it will be fairer to support legislative discrimination for their protection by arguments not derogatory to other claims. Such arguments can well be brought forward without specious pleading.

Both from an economic and from the historical point of view the status of women is constitutionally different from that of men: economically, because the temporary and adventitious character of women's industrial work, due to the effect of marriage upon their industrial status, handicaps their capacity for combination and hence their capacity for efficient selfhelp, and further because the state has a distinct interest in conserving part of a woman's time and strength to enable her more adequately to perform her non-industrial functions, her duties to the home and the family, and to render her indispensable aid in the furtherance of the state's child welfare policies;—historically, because centuries of economic dependence and the universal conventional discouragement of habits of self-assertion necessarily removed women from those ideals of individualism which were in America supposed to have crystallized into constitutional rights and limitations upon the legislative power; it is true that these conventions with regard to women have partly been altered; but coincident with their advance toward greater independence has been a general modification of the ideals of individualism. Nothing could be more characteristic of that coincidence than the fact, that the legislature of Illinois, on March 22, 1872, passed an act declaring that sex should not be a bar to any occupation or employment, and five days thereafter, on March 27, 1872, passed another act forbidding the employment of women in mines,—enactments opposed to each other upon a mechanical view of liberty, and yet quite harmonious in spirit as making for a larger freedom of women. It is obvious that upon any large view women stand on a different footing from men as regards the exercise of legislative protection. In all European countries and by the international conventions regarding industrial labor this has been recognized. It follows that a very much further

reaching control over women than we have at present would leave unprejudiced the problem of legislative policy with reference to adult men.

Germany, whose program of social legislation has been more systematic and comprehensive than that of any other country, has yet so far firmly adhered to the principle of non-interference of the state in the terms of the wage contract between employer and adult male employee except for the purpose of preventing abuses in methods of payment (truck acts). Reduced hours of labor and increased pay are left to free bargaining between the parties. France has been, if possible, even more individualistic than Germany in this respect. Until recently English legislation pursued the same policy, but departed from it in establishing the eight hour day for coal mines in 1908 (distinctly not a sanitary measure) and in applying the trade board system for fixing minimum wages in sweated trades to men as well as women, and enacting a similar wage act for coal miners (Acts of 1909 and 1912), while constitutional scruples have confined similar legislation in America to women. England has indeed entered upon a deliberate policy of economic reconstruction in an entirely distinct field of legislation, that of land tenure, and has undertaken to alter fundamentally the status of an entire class of the population. The Agrarian legislation for Ireland culminating in the measures of 1881 and 1897, dictated by political considerations, was in 1912 upon purely economic grounds applied to Scotland, and the extension of a similar system to England will perhaps be hastened by the necessity of making the national food supply less dependent upon foreign imports.

Here is legislation of a purely socialistic type showing the liability of even apparently most firmly fixed policies to be revolutionized by change of conditions or change of sentiment.

Why should industrial legislation be exempt from like revolutionary change? It is true that the state has thus far departed very little from its attitude of neutrality in the

struggle between capital and labor. Of the things that labor most desires, naming them in the order of the strength of the desire: chance of employment, security of employment, better remuneration, lessened toil, fairness of methods, safe and sanitary conditions, and relief in distress, it appears that even the most advanced type of European social legislation undertakes to secure less than one half, being the half less prized by labor. If the reason for this is that the conditions for radical improvement are or are believed to be beyond legislative control, or the effectual remedy unknown, legislative inactivity cannot be said to be a matter of deliberate policy of self-imposed limitation, but merely the consequence of imperfect power and knowledge, and advance in legislation would merely wait upon advance in knowledge and efficiency. At any rate the possibility of embarking upon new policies seems to be foreshadowed both by the growing insistence of what is called the new social conscience, and by the fact that the widest possible scope of state control is the avowed demand of a political party which is constantly growing in strength.

If this brief outline has correctly characterized the various aspects of social legislation and the stages in its progress, it is also easier to understand the position of American courts. In their hostile or suspicious attitude toward legislation regulating hours of labor and payment of wages which they regarded as involving merely economic issues, they resisted the beginnings of a novel function of state control, and if they nullified even reasonable and necessary measures, it was perhaps because they were unwilling to concede the first steps in a development, the scope of which they could neither define nor foresee, and the full course of which must justly have appeared to them as revolutionary.

But a larger view of changes and developments than courts are in the habit of taking must also make us extremely skeptical with regard to the fundamental assumption underlying their method of approaching legislation.

Into the general clauses of the constitutions they have read a purpose of fixing economic policies which, however firmly rooted in habits of thought or structure of society, are by their very nature unfit to be identified with the relatively immutable concept of due process. Where the makers of constitutions did intend to establish policies, they did so in express terms; freedom of speech and press, religious liberty, the favor to the accused in criminal proceedings,—these we find guaranteed in specific clauses; and nothing was guaranteed that had not at some time been a live issue. It was foreign to their minds to foreclose issues that no one could foresee. Due process was a concept centuries old and meant to last for centuries; the idea that it should be subject to amendments, qualifications or exceptions is utterly incongruous.

That the clause should have been seized upon to protect policies which to the courts seemed essential to the social structure they were used to was perhaps not unnatural; but it was certainly an extreme step for the Court of Appeals of New York to identify the constitution with a policy which it recognized as standing in need of a change. In any event the attempt of the courts to check modern social legislation by constitutional principles can be properly estimated only if we recognize in it the exercise of a political, and not a strictly judicial, function.

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